PRESTIGE CERAMICS SDN BHD

v.

KESATUAN PEKERJA PEMBUATAN BARANGAN BUKAN LOGAM & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-98-1999]
12 JUNE 2000

LABOUR LAW: *Industrial Court - Award - Award compelling employer to pay increments and bonuses due under collective agreement - Whether Industrial Court should have varied collective agreement in view of financial difficulties put forth by employer - Whether Industrial Court's reasoning that financial difficulties was not within "special circumstances" to vary agreement wrong in law - Industrial Relations Act 1967, s. 56(2)*

LABOUR LAW: *Trade union - Collective agreement - Increments and bonuses - Whether employer compelled to pay despite financial difficulties - Whether court should allow employer's application to vary agreement under s. 56(2) Industrial Relations Act 1967 - Whether financial difficulties within "special circumstances" under s. 56(2)*

The 1st respondent, the trade union of the applicant company, sought for an order under s. 56(1) of the Industrial Relations Act 1967 ('the 1967 Act') to compel the applicant to pay increments and bonuses due under the collective agreement agreed upon by the said parties. The applicant sought the protection of s. 56(2) of the 1967 Act which allowed the Industrial Court to vary a collective agreement in light of special circumstances. The applicant premised its case on financial hardship due to economic crisis. The Industrial Court held that "special circumstances" under s. 56(2)(c) did not include financial difficulties because if it did it would lead to a flood of similar claims. The Industrial Court then granted an award in favour of the 1st respondent. Hence, the applicant's application for *certiorari*.

Held:

[1] In spite of the evidence led before it, the Industrial Court failed to take into consideration the causes for the applicant's financial distress and proceeded on a rigid generalisation that financial hardship and business losses could not amount to special circumstances under s. 56(2) of the 1967 Act. It also did not take into consideration s. 30(5) of the 1967 Act.

[2] The Industrial Court was strongly persuaded by a perceived fear that its action may lead to flood claims. No evidence was adduced to substantiate that fear. Its reliance on that unsubstantiated factor as a basis for its award was by itself a ground for review.

[3] There was no dispute as to the scale of the applicant's financial hardship and the 1st respondent did not dispute any of the facts or particulars of the applicant's case. The Industrial Court failed to carry out and give effect to the policies and objectives of the 1967 Act and s. 56(2)(c) thereof where the extent of the applicant's hardship was admitted. Those provisions were clearly intended to lessen the burden imposed on a party to an award or a collective agreement due to special circumstances of any kind.

[4] By adopting the inflexible generalisation, the Industrial Court failed to take into account matters which were relevant and germane to the vital choice it had to make under s. 56(2) of the 1967 Act. The Industrial Court instead asked itself the wrong questions, misapplied the law and arrived at a decision which no reasonable decision-maker in similar circumstances would have reached.

[Application allowed.]

Case(s) referred to:

CCSU v. Minister for the Civil Service [1984] 3 All ER 935 ***(refd)***

Dunlop Industries Employees Union v. Dunlop Malaysian Industries Berhad [1987] 2 MLJ 81 ***(refd)***

Hock Hua Bank (Sabah) Berhad v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 ***(refd)***

Holiday Inn Kuala Lumpur v. National Union of Hotel, Bar and Restaurant Workers [1988] 1 MLJ 306 ***(refd)***

Hotel Malaya Sdn Bhd v. National Union of Hotel, Bar and Restaurant Workers [1982] 1 CLJ 460 ***(refd)***

Hong Leong Equipment v. Liew Fook Chuan [1997] 1 CLJ 665 ***(refd)***

Goon Kwee Phoy v. J & P Coats Sdn Bhd [1981] 2 MLJ 129 ***(refd)***

Marlin Rajiman v. MAA Services Sdn Bhd [1994] 2 CLJ 591 ***(refd)***

Non-Metallic Mineral Products Manufacturing Employees Union & Ors v. South East Asia Fire Bricks [1976] 2 MLJ 67 ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia [1997] 1 CLJ 147 ***(refd)***

Syarikat Kenderaan Melayu Kelantan Berhad v. Transport Workers Union [1995] 2 CLJ 748 ***(refd)***

Viking Askim Sdn Bhd v. National Union of Employees in Companies Manufacturing Rubber Products [1991] 2 MLJ 115 ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20, 30(5), (6), 56(1), (2)(c)

Interpretation Acts 1948 and 1967, s. 17(A)

Other source(s) referred to:
Administrative Law, Wade and Forsyth, 1994, 7th edn, p 312
Judicial Review, Law & Procedure, Richard Gordon QC, 6th edn, p 29

For the applicant - S Rutheran; M/s R Sivagnanam & Assoc
For the 1st respondent - P Thavaselvi; M/s P Kuppusamy & Co

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:

The applicant in the instant case is a ceramic tile manufacturer. It faced serious difficulties with the onset of the Asian Economic crisis. In the light of the circumstances and the rapid decline in its business, it was not in a position to pay annual increments or bonuses to its employees as provided for by the collective agreement duly executed with the 1st respondent ("the union"). The applicant took the view that it ought to be excused from these obligations in the light of the oppressive effects of the recession which had resulted in a sudden decline in its business. Those were not ordinary time. Therefore, when the union sought an order for compliance against the applicant under s. 56(1) of the Industrial Relations Act 1967, to compel the payment of increments and bonuses, the applicant sought the protection of s. 56(2) of the 1967 Act which allows the Industrial Court to vary a collective agreement in the light of these special circumstances. The applicant premised its case on the footing that it had been generous with its employees through the years and that in the present climate all other employees had already faced freeze in bonuses and increments. The applicant took the position that its claim for variation was not to disgorge the pay increases that had been awarded to the employees over the years but to merely halt further increases above that which had already been given due to the current circumstances. The Industrial Court declined to do so although the applicant had set out detailed particulars as to how it had been maimed by the recession and why it was compelled to seek a variation. Even the 1st respondent did not dispute any of these facts or particulars nor did it suggest that the applicant was over exaggerating the issue in any way. However, the Industrial Court declined to accord the applicant the protection it sought on a highly questionable ground. In that, it was of the view that "special circumstances" under s. 56(2)(c) could not include financial difficulties, because if it did it would lead to a flood of similar claims.

It is very clear from the award that in spite of the evidence led before it the Industrial Court failed to take into consideration the causes for the applicant's financial distress and proceeded on a rigid generalisation that financial hardship and business losses cannot amount to special circumstances. Clearly it had

asked itself the wrong question. A reasonable decision-maker would not have drawn such a broad generalisation. It would have instead investigated the causes of the losses before concluding whether or not they amount to special circumstances. It is the position of the applicant that s. 56(2) of the 1967 Act is not at all amenable to such a narrow and rigid construction. I think the section by its very imprecision is far reaching in that, it allows the Industrial Court to consider applications on a case by case basis to determine whether the circumstances complained of were indeed special circumstances meriting variation or otherwise. The court would in the proper discharge of its duties have to consider the causes of the financial hardship and whether those "causes" may be regarded as having emanated from "special circumstances". In this regard I am of the view that the unsubstantiated fear of a flood of claims irrespective of the causes for that hardship and its impact on the applicant is an irrelevant consideration. In holding as it did the Industrial Court had reached an absurd conclusion that if the end result was financial distress, the causes therefore are irrelevant and the court will not vary the award on the collective agreement. What then is the purpose of s. 56(2)(c)? The Industrial Court misapplied the law, asked itself the wrong question and unlawfully fettered its own discretion.

It is observed that this is a case of an applicant whose business depended upon the construction industry for its survival. It had over a period of time enjoyed a healthy growth which was funded through the strong demand for its products. This enabled it to offer generous wages, increments, bonuses and other benefits to its employees, when it negotiated successive collective agreements with the 1st respondent. The last of such agreement was the 7th collective agreement cognisance number 380/97 ("the relevant collective agreement") which was concluded on the same generous basis in view of the favourable business performance which then prevailed. In fact the benefits that were provided were in material respects higher than those conventionally awarded by the Industrial Court as the adjustments exceeded 2/3rds of the CPI (consumer price index) (encl. 4, exh. PC3 p. 49). However, there was a drastic turn of events after the execution of the said agreement. What had started out as a currency problem eventually led to what was better known as the "Asian Economic Crisis", which deepened at an alarming rate. One of the immediate casualties of this crisis was the construction sector which consumed the applicant's products. This crisis had in a very short time turned the tables on the applicant. It was now faced with a scenario that was the reverse from what it had been accustomed to, in that:

(i) the cost of its materials were rising out of all proportions (encl. 4, exh. PC3 p. 38-41);

(ii) the prices of its products were falling rapidly (encl. 4, exh. PC3 p. 44);

(iii) its overall costs had outstripped revenue (encl. 4, exh. PC3 p. 42);

(iv) its marginal cost was higher than revenue (encl. 4, exh. PC3 p. 43);

(v) the demand for its product fell drastically (encl. 4, exh. PC3 p. 48);

(vi) its unutilised capacity sky rocketed (encl. 4, exh. PC3 p. 48);

(vii) its reserves of over RM18 million in January 1998 were depleted to about only RM1 million within a short span of time of one year. (encl. 4, exh. PC3 p. 45);

(viii) From a marginal profit of RM1.2 million the company plunged to a loss of over RM16 million. (encl. 4, exh. PC3 p. 46).

The applicant went so far as to establish that the industry was so critically affected in that the industry demand for ceramic tiles stood at about 48 million square meters in 1996 with 18 manufacturers with a total capacity of 65 million square meters (encl. 4, exh. PC3 p. 28), and this collapsed to a mere 23 million square meters in 1998-1999 (encl. 4, exh. PC3 p. 19). It is noteworthy that in the instant case the union admitted all of the above matters.

In the light of the above, the applicant took various measures to salvage its business. This included:

(i) a cost reduction programme which entailed reductions in administration and marketing expenses from February 1998 (encl. 4, exh. PC3 p. 29-30);

(ii) a freeze on annual increments and bonuses for all non-unionised staff;

(iii) a general freeze on recruitment save for the replacement of key vacancies;

(iv) a general reduction in benefits and allowances for non-unionised staff (encl. 4, exh. PC3 p. 34);

(v) non-payment of dividends to shareholders for two financial years. (encl. 4, exh. PC3 p. 47).

In due course bonuses and annual increments became due to the employees who were covered by the relevant collective agreement. The circumstances faced by the applicant however were completely different from those which prevailed when it executed the relevant collective agreement. The applicant was of the view that as the surrounding conditions which prevailed when the agreement was concluded were no longer in existence it was only proper that

the applicant be relieved of the liability to bear further costs arising from increments and bonuses under the relevant agreement. The union did not agree. On 4 January 1999 and on 2 April 1999 respectively the union filed separate applications under s. 56(1) of the 1967 Act pursuant to Form S of the Industrial Relations Act 1967. The application was for an order for compliance in respect of the non-payment of bonus and increments due under the collective agreement between the applicant and the union under the cognisance No. 380/97. For the applicant, the proper course of action to take would be to vary the agreement so as to absolve the applicant from any further obligation in relation to both annual increments and bonuses. It is observed that the facts set out by the applicant both in its statement in reply and bundle of documents as being the impact of the recession on the applicant were admitted without reservation by the union.

In its award the Industrial Court opined as follows:

(i) that there was no need for oral evidence to be taken as the union had admitted the issue of financial incapacity and the truth of the applicant's documents;

(ii) that the court accepts the submission by the applicant's counsel that an order for compliance is not automatically issued upon the admission of non-compliance;

(iii) that the court has the power to vary or set aside the relevant provisions of the collective agreement upon special circumstances;

(iv) that although the union's representative was unable to cite any authorities it is trite law that financial inability to pay is not a special circumstance and making a loss is not a special circumstance;

(v) that if the court were to entertain a variation of the collective agreement in these circumstances it would open the floodgates and that the court would be inundated with applications by companies to vary or set aside collective agreements with which they failed to comply.

Hence these proceedings.

I am of the opinion that the construction given by the Industrial Court, to the powers vested in it under s. 56(2) were unduly inhibitive and were contrary to the natural and ordinary meaning of the words used in the said section, *ie*, by holding that financial difficulties can never amount to special circumstances. It therefore acted contrary to the Industrial Relations Act 1967 and s. 17A of the Interpretation (Amendment) Act 1997 by wrongfully fettering its discretion. Section 56 of the Industrial Relations Act makes provision for the enforcement of awards and collective agreements and powers related thereto. In the instant

case it is concerned with the collective agreement cognisance No. 380/1997. The exercise of jurisdiction under this section entails a two fold process, namely:

(i) Establishing the existence of a breach of the award or collective agreement (s. 56));

(ii) The determination of which of the courses of action set out in s. 56(2) to take, namely:

(a) make an order directing any party –

i. to comply with any terms of the award or collective agreement; or

ii. to cease or desist from doing any act in contravention of any term of the award or collective agreement;

(b) make such order as it deems fit to make proper rectification or restitution for any contravention of any terms of such award or collective agreement; or

(c) make such order as it considers desirable to vary or set aside upon special circumstances any term of the award or collective agreement.

This principle was expounded by the Supreme Court in *Holiday Inn Kuala Lumpur v. National Union of Hotel, Bar and Restaurant Workers* [1988] 1 MLJ 306 at p. 311. In that case Seah SCJ opined as follows:

> Now, section 56 is concerned with the enforcement in a summary manner of an award made by the Industrial Court or of a collective agreement which has been taken cognisance of by the court under section 17 after a complaint has been lodged as to its non-compliance. The non-compliance of a term of the award or collective agreement must exist as an antecedent fact before the Industrial Court can exercise its powers contained in subsection (2) thereof. It is therefore, a condition precedent to the exercise of those powers that there should be in existence a breach or non-observance of a term of the award or collective agreement. This must be satisfactorily established by the complainant.

The 1967 Act however does not set out any preference as to which option under s. 56(2) is to be preferred in a given case. The Act does not in any way suggest that the Industrial Court should prefer an order for compliance to an order for variation, it leaves it in the hands of the Industrial Court the choice of which option to take based on the facts of each case.

In *Hong Leong Equipment v. Liew Fook Chuan* [1997] 1 CLJ 665 at 706 Gopal Sri Ram JCA made the following observation as to the approach to be

taken by a decision maker where the statute is silent as to how exactly it ought to act:

> The sub-section, however, gives no indication of the factors or considerations by which the Minister is to be guided when exercising his discretion ... .
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> It may, I think, be stated as a very general guide that a fair exercise of the discretion in question would be that which best achieves the object of the Act. That object is disclosed in the preamble to the Act which declares itself to be an Act:
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> > To provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom.

That said, the following factors will materially affect the exercise of jurisdiction under s. 56 of the 1967 Act and the choice to be made under s. 56(2):

(i) The requirements of s. 30(5) and 30(6) of the 1967 Act will apply. In *Dunlop Industries Employees Union v. Dunlop Malaysian Industries Berhad* [1987] 2 MLJ 81, Eusoffe Abdoolcader SCJ said:

> The provisions of section 30(5) and (6) will also therefore equally apply considering a complaint under section 56.

It is to be noted that s. 30(5) of the 1967 Act reads:

> The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

And s. 30(6) of the 1967 Act reads:

> In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3).

(ii) The wide sweep and the effect of s. 30(6) and the meaning of the salient phrases therein was set out in *Syarikat Kenderaan Melayu Kelantan Berhad v. Transport Workers Union* [1995] 2 CLJ 748, Gopal Sri Ram JCA cited the decision of High Court Australia which is at p. 776:

> Section 42 has received judicial consideration in at least two decisions of the High Court of Australia. In *R v. Commonwealth Court of Conciliation and Arbitration; Ex parte Kirsch* [1938] 60 CLR 507, at

538 Dixon J explained the philosophy underlying the section in these words:

> Now, apart altogether from this development of the law, it has been well understood that, when a dispute in relation to any particular term of employment or condition of labour is before the court for settlement, the power of the court extends to the making of such award as appears apt and proper to determine the dispute and to give just relief from the substantial grievance from which it arises. In spite of the many unrealities which have attended the growth of the jurisdiction, the discretion of the court to provide that remedy which on investigation appears best calculated to achieve the chief purpose of the court, namely, the settlement of industrial disputes, has never been restricted by a requirement that it should rigidly adhere to one or other of the rival proposals or desires of the respective parties. This principle retains its place in the system and must be applied to the developed condition of the law. *But the court cannot make an award except for the settlement of the actual dispute between the parties and, therefore, it is beyond its jurisdiction to impose an obligation upon them, or one of them, that is not related to the disagreement or issues between them that is to the matter of the dispute.* Many expressions have been used to describe the kind and the degree of connection which is necessary. It is sometimes said that the relief contained in the award must be relevant. Sometimes that it must be reasonably incidental to the settlement of the differences constituting the dispute. Sometimes that it must be appropriate to the settlement of the dispute, that is, the relief must have a rational or natural tendency to dispose of the question at issue. *In applying a test of such a nature it is important to understand the true character of the two things to be brought into comparison, the matter of the dispute and the provision proposed.* To obtain a correct understanding of the matter in dispute, it is not enough to read the text of a log of demands without regard to any of the facts and circumstances out of which it arises. A log is not an instrument with a prescribed legal effect. It is nothing but a catalogue of claims supposed to represent the real desires of actual people. (Emphasis added).

(iii) Interpretation (Amendment) Act 1997. This Act has been amended in material respects in 1997 which amendments have elevated the Act from being one which merely sought to act as an interpretative aid for laws and documents to one which now regulates the exercise of all statutory functions:

> The original long title was: "An Act relating to the interpretation of certain written laws and public documents."
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> The amended long title reads: "An Act to provide for the commencement, application, construction, interpretation and operation of written laws; to provide for matters in relation to the exercise of statutory powers and duties; and for matters connected therewith.

The new s. 17A reads:

> S/17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

In the light of the above it is plain that in exercising the jurisdiction vested in this court, regard must be had to "the facts and circumstances" out of which the complaint arises and an award made must be "apt", "relevant" and "proper". The course of action taken must also have as its effect the promotion of the underlying purposes of the 1967 Act. Applying the facts of the instant case I am of the opinion that any reasonable person similarly circumstanced would have realised that in the face of the undisputed "facts and circumstances" of the case, the "apt and proper" and "relevant" course of action to be taken was to have varied the collective agreement under s. 56(2)(c) so as to absolve the applicant from any added cost due to further annual increments and bonuses. The Industrial Court did not do this. It chose to ignore the facts and circumstances of the case simply because they pointed towards financial distress. In so doing the Industrial Court fell into error and its award ought to be quashed for its failure to take into consideration relevant matters. It is plain that the Industrial Court ought to have given the above provision its plain meaning. In that, whilst Parliament made it mandatory for collective agreements to have a minimum life span of 3 years, the Industrial Court was to be vested with the power to vary the provisions of such an agreement if it found "special circumstances" to exist. As to what special circumstances were, each case would have to be dealt with on its own facts, the Industrial Court would have to investigate the causes of non-compliance and their circumstances in each case to determine this issue. In *Hotel Malaya Sdn Bhd v. National Union of Hotel, Bar and Restaurant Workers* [1982] 1 CLJ 460 at 463, Raja Azlan Shah CJ (as he then was) held as follows:

> It exercises a quasi-judicial function. It gives a full reasoned judgment in the nature of an award (section). Its functions comprise an investigation of the facts, an analysis of the facts, findings of acts, and, lastly, the application of the law to those findings.

The above was cited with approval by Eusoffe Chin SCJ (as he then was) in *Marlin Rajiman v. MAA Services Sdn Bhd* [1994] 2 CLJ 591. In *Non-Metallic Mineral Products Manufacturing Employees Union & Ors. v. South East Asia Fire Bricks* [1976] 2 MLJ 67, Raja Azlan Shah CJ (as he then was) made a similar observation at p. 68I:

> The Act is intended to be a self-contained one. It seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given in circumstances peculiar to each dispute and the Industrial Court is to

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> a large extent free from the restrictions and technical considerations imposed on ordinary courts.

Therefore it is obvious that the 1967 Act does not allow the Industrial court to fetter its discretion by taking a standing position, irrespective of the facts and circumstances of individual cases – that financial hardship cannot be b special circumstances. After all one of the hallmarks of Industrial adjudication lies in the power of the Industrial Court to vary and modify strict contractual rights particularly in cases such as ours where the right to do so is expressly reserved by a statutory provision, *ie*, s. 56(2). In *Viking Askim Sdn Bhd v. National Union of Employees in Companies Manufacturing Rubber Products* c [1991] 2 MLJ 115 at 122, Edgar Joseph J (as he then was) made the following observations:

> ... on following statement by Ludwig Teller in his book, entitled *Labour Disputes and Collective Bargaining* (vol. 1) at p. 536:
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> d Industrial arbitration may involve the extension of an Existing agreement, or the making of a new one or in general the creation of new obligations or the modifications of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements.

e It is self-evident that by failing to address its mind to the merits of the case the Industrial Court had merely applying a rigid policy that financial difficulties cannot amount to special circumstances. The chairman held:

> ... it is trite law that financial inability to pay is not special circumstances allowing the Court to vary or set aside a collective agreement. Making a loss f in business cannot be special circumstances. The Court must be careful not to open the floodgate. If it does the Court will be inundated with applications by Companies to set aside or vary collective agreements which they have failed to comply.

The Industrial Court saw it fit to apply this sweeping generalisation in spite g of all the evidence and particulars that had been canvassed and articulated before it as to the causes for the financial hardship. It proceeded on the basis that if the end result was financial distress the causes therefore were irrelevant. It failed to consider and determine as it ought to have whether the causes for the applicant's financial hardship amounted to special circumstances. Rather, h it proceeded on an inflexible rule of thumb that financial distress cannot amount 'to special circumstances regardless of the facts and circumstances of the individual case. I am of the opinion that the award of the Industrial Court in the instant case lies open to review on the following grounds:

i (i) It failed to take into consideration relevant matters;

(ii) It unlawfully fettered its own discretion;

(iii) It misconstrued the provisions of the Industrial Relations Act 1967;

(iv) It reached a conclusion that was contrary to the policies and objectives of the 1967 Act.

In *Syarikat Kenderaan Melayu Kelantan Berhad v. Transport Workers Union* [1995] 2 CLJ 748 at 765, the court said:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed as Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.

In *Judicial Review, Law & Procedure (*6th edn), Richard Gordon QC at p. 29 stated:

> In *Stringer v. Minister of Housing and Local Government* [1070] 1 WLR 1281 at p. 1298 Cooke J. observed that a policy may be susceptible to judicial review if reliance thereon prevents consideration of "all the issues which are relevant to each individual case as it comes up for decision."

It is clear here that the sweeping generalisation made by the Industrial Court entailed the rejection of any and every application for variation simply because financial distress was a factor. The Industrial Court failed to have regard the substantial merits of the case and its decision was in all the circumstances perverse and unreasonable. It also did so without regard to section 30(5) of the Act which provides:

> The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

It must be emphasised, that this was not a case of an employer who was seeking a wage cut for its workers or a withdrawal of their benefits. All the applicant sought was a halt in the increase in its outlay for unionised employees through the payment of annual increments and bonuses as it had instituted for all other levels of staff in uniform. However, notwithstanding this the Industrial Court did not appear to have considered whether a decision to compel the applicant to carry this additional burden was a course of action which can in good conscience be taken in the light of the facts and circumstances of this case. The obvious question that the Industrial Court ought to have addressed was whether it was conscionable for the applicant to have to pay one set of workers annual increments and bonuses whilst all other

workers and even the shareholders had received a reduction in their entitlements. The Industrial Court disregarded this and instead made its award summarily based on a mindset that it may not have regard to financial difficulties. The Industrial Court placed an undue weight and emphasis to irrelevant and unfounded considerations *viz*, the possibility of a flood of claims by employers whilst failing to appreciate the fact that it was under a statutory duty to determine which employers were deserving cases and which were not, on a case by case basis. In the instant case there was no question as to the genuineness of the employer's case as the union admitted this. It is very apparent from the Award that it was strongly persuaded by a perceived fear that its action may lead to a flood of claims. First of all no evidence was adduced before the Industrial Court to substantiate this fear. Its reliance on this unsubstantiated factor as a basis for its award is by itself a ground for review. In *R Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 CLJ 147 at pp. 214-215, Edgar Joseph FCJ held as follows:

> ... where there is no evidence to support a conclusion, there is necessarily an error of law in the decision arrived at (see *Edwards v. Bairstow* [1956] AC 14 ...
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> But, as Wade and Forsyth *Administrative Law* (7th edn, 1994) have correctly pointed out (at p. 312): 'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding (see *Allinson v. General Medical Council* [1894] 1 QB 750 ... or where, in other words, no tribunal could reasonably reach that conclusion on that evidence... This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorized and *ultra vires*.

However, I think the Industrial Court was not entitled to curtail and restrict the natural meaning of the 1967 Act simply because it feared that there would be a flood of claims. It is not at all permissible for a decision-maker to take a course of action to hamper and limit legitimate claims to reduce its workload that if at all is the function of the legislature. The 1967 Act itself provides plentiful examples. The construction of the term 'considers himself dismissed' (s. 20 of the 1967 Act). There was a point in time when an issue arose as to whether the term dismissal ought to be confined to a dismissal for misconduct or whether the term may permissibly extend to a severance of the contract by the giving of due notice, the non-confirmation of a probationer, the non-renewal of a fixed term contract, a constructive dismissal due to the conduct and actions of an employer against an employee.

The decision of Raja Azlan Shah in *Goon Kwee Phoy v. J & P Coats Sdn Bhd* [1981] 2 MLJ 129 led to the adoption of a loose and liberal interpretation to the term 'considers himself dismissed'. It is true that such an approach to interpretation led to an extension of the categories of cases which admitted a referral to the Industrial Court and to the workload of the Industrial Court. However, the Industrial Court and the Superior Courts did not see fit to deprive and could not rightly deprive any person of their rightful statutory recourse, by adopting a construction of the 1967 Act which would operate to reduce claims, contrary to the 1967 Act. Of course in each case the Industrial Court would have to study the facts before determining whether or not a claim has been made out. However, in the case of s. 56(2)(c) of the 1967 Act, the approach of the Industrial Court appears to be very different. The Industrial Court has chosen to curtail and limit the scope of the 1967 Act, by excluding financial hardship altogether from the term "special circumstances", irrespective of the individual merits of a case. It must be observed that a decision-maker who is vested with the power and duty to entertain applications of a particular kind cannot abdicate that function by adopting a rigid and doctrinaire approach to interpretation. No injustice would be done by recognising in principle that financial hardship may constitute special circumstances in appropriate cases. It being for the parties to establish in evidence whether indeed that were so, the Industrial Court will have every opportunity to scrutinise the facts and circumstances of each case to ensure that there is no abuse of the said provision. This the Industrial Court did not do; it instead proceeded to short circuit the entire process on the purported basis that financial hardship cannot constitute "special circumstances".

Even if the Industrial Court genuinely feared the potential for abuse if it were to have recognized financial hardship as special circumstances, it ought to have realized that the facts of the instant case would not have resulted in a flood of claims because:

(i) In the instant case there was no dispute as to the scale of the applicant's financial hardship;

(ii) The union had never suggested that the applicant was not facing genuine hardship due to the recession;

(iii) The union never contended that the applicant indeed had the means to meet enhanced costs;

(iv) The union did not raise any evidence whatsoever to rebut the applicant's evidence or to suggest that it was false in any material particulars.

But nevertheless deciding as it did, the Industrial Court had infringed s. 17A Interpretation (Amendment) Act 1997 and it failed to carry out and give effect to the policies and objectives of the 1967 Act and s. 56(2)(c) thereof in relation to a case where the extent of the applicant's hardship was admitted. These provisions were clearly intended to lessen the burden imposed on a party to an award or a collective agreement due to special circumstances of any kind. The Asian Economic Crisis of 1997 which we still endure to this date was an event which nobody foresaw and which affected the entire nation. Any other interpretation will only stultify the effect of s. 56(2)(c) of the 1967 Act and leave a party who was genuinely facing hardship without the protection to which he was entitled.

It is also observed that the Industrial Court breached the rules of natural justice by taking into consideration matters which were never raised by either party in the proceedings before it. A point that is of no small importance here is that, the union in the instant case premised its case on one and only one fact, *ie*, that financial hardship cannot constitute special circumstances. The union:

(i) Admitted to the applicant's "financial incapacity";

(ii) Admitted to the "truth of the applicant's documents";

The award of the Industrial Court, is also premised on the fact that:

(i) There is a non-compliance of the collective agreement;

(ii) Financial hardship is not special circumstances.

However, in the notes of proceedings the Industrial Court appeared to have taken into consideration a factor which neither party argued upon and which did not even appear in the award proper. This seems to have been the only reason considered and it did not feature anywhere in the award *(Refer: Afidavit Tambahan Lim Choon Moi affirmed on 8 December 1999)*:

> Court decides:
>
> The Court agrees with the Company on the law that it has the power to vary the agreement under section 56(2)(c). However, the Company had not established that it had "special circumstances". It is not insolvent. Although it has made losses last year it still had reserve and its share capital and assets.

This is clearly a "procedural impropriety". If the Industrial Court regarded it as relevant to the determination of "special circumstances" notwithstanding its view that financial hardship cannot amount to special circumstances, it ought to have allowed the applicant a chance to make submissions or adduce evidence upon the same. The applicant was deprived of that opportunity

outright and it is hard to tell to what extent the Industrial Court was in fact swayed by those factors appearing in the notes under the heading "court decides". In *Hock Hua Bank (Sabah) Berhad v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900 at 906, Gopal Sri Ram JCA said:

> First, in arriving at a decision upon any matter that presents itself for curial scrutiny, a Judge must confine himself to the points raised by counsel before him. He may not decide a case upon a matter not raised by counsel unless he has first put the point fairly to both sides. It is not a matter of mere technicality. It is a rule of essential justice. The principle was stated by Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* [1982] 2 WLR 322, at page in words that merit recollection:
>
> > Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is. In the instant case counsel for Hamilton and Bould complained that Lord Denning MR had selected one speech alone to rely upon out of many that had been made in the course of the passage of what was a highly controversial Bill through the two Houses of Parliament; and that if he, as counsel, had known that the Master of the Rolls was going to do that, not only would he have wished to criticise what Lord Wedderburn had said in his speech in the House of Lords, but he would also have wished to rely on other speeches disagreeing with Lord Wedderburn if he, as counsel, had been entitled to refer to *Hansard*.

In any event, the findings of the Industrial Court were entirely perverse in that the Industrial Court failed to have any regard for the fact that the applicant's reserves had plummeted from RM18 million to about RM1 million in just a year. It failed to have regard for the fact that its marginal profit of RM1.2 million was transformed into a loss of RM16 million in just a year. More importantly, the totality of the evidence presented to the Industrial Court was without doubt a picture of a company in decline (refer para 3.4 herein). I think by adopting the inflexible generalisation which it did, the Industrial Court failed to take into account matters which were relevant and germane to the vital choice it had to make under s. 56(2) of the 1967 Act once there was a non-compliance in place. The Industrial Court instead asked itself the wrong questions, misapplied the law and arrived at a decision which no reasonable decision-maker similarly circumstanced could have reached. Lord

Diplock aptly summed up the proposition as follows in the famous case *CCSU v. Minister for the Civil Service* [1984] 3 All ER 935 at p. 951:

> By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' ... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrive at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

For the foregoing reasons an order in terms of (i) and (ii) is hereby granted.